APPENDIX B.

UNITED STATES DISTRICT COURT	EASTERN DISTRICT OF WISCONSIN
John LeFeber, Plaintiff, vs. A. H. Wilkinson, Defendant.	Emily Nunnemacher, Plaintiff, vs. A. H. Wilkinson, Defendant.

DECISION.

THE COURT: I think Mr. Glickman is right in saying that the whole proposition comes down to the single direct statement: Can an excise tax be effective other that *in future?*

The case comes here really with the necessity, as I might say, of deciding the case definitely. The proposition that is presented here rests ultimately upon the definitive inclusion or exclusion of elements and ingredients in what is called an 'excise'; I mean, the so called burden which we term an excise; and it would seem to me that the implication is that as between the Government and the subject who is expected to be reached by the law, either in respect of his property, or, as we might say, of his conduct, of his movements, that will be open to choice; the implication in an excise not theretofore existing or not theretofore exacted, to the subject is: 'If you want to do this particular thing you can do it with the burden attaching to you, which we will now impose on you.'

Then, in the case of a gift, as in the case of certain other taxes that are not direct taxes, the subject can take his choice. If he wants to do it he must submit to the burden which the law imposes upon the doing of

the act; but, when it appears that the act has been fully completed prior to the passage of the law, why of course the burden is imposed without the choice of relief by concluding not to exercise the privilege.

Now, when that is so, the question is particularly asked. Here are the gifts made in February and May, 1924, prior to the passage of this act. It seems absurd to say that the Nunnemacher and LeFeber donors should be told on June 2, 1924, that they are now subjected to an excise upon an act wholly beyond their power to revoke, recall, or do a thing in respect of what they had previously done; and how then can you escape the idea, although it is called an excise, that it is nothing more or less than a direct tax, either against their property or against them, in respect of a completed transaction, which, if I might put it that way, at the time Congress passed the law was no longer, as to them, *excisable?*

I am impressed with the fundamental character of that question; that the plaintiffs can well urge it at the threshold of these cases; and being decided favorably to them dispenses with the necessity of considering or, much less, determining the validity of the law outside of that, and the plaintiffs may take a judgment in each of the cases.

FILED
SEP 13 1937
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CLERK

UNITED STATES OF AMERICA

The Supreme Court

JOHN W. BLODGETT,
Plaintiff-in-Error,
vs.
CHARLES HOLDEN,
U. S. Collector of Internal Revenue for the Fourth Collection District of Michigan,
Defendant-in-Error.

OCTOBER TERM 1937
No. 154.

On certificate from the United States Circuit Court of Appeals for the Sixth Circuit.

Supplemental Brief for Plaintiff-in-Error

MARX NORRIS, Counsel.

II.

The Revenue Act of 1926, amended Sec. 319 of 1924,

See: 44 Stat. part 2, page 86, Sec. 324.

and provided that as amended it should go into effect

June 2, 1924.

44 Stat. Pt. 2, page 87, Sec. 324 (b)

10/4/27

Mark Norris,

Counsel for John W. Blodgett.

No. 154.

October Term, 1927.

Blodgett,

vs.

Holden.

I.

The Gift Tax Act of 1924 is found 43 Stat. p. 313. Sec. 319 et seq.

and went into effect

"Except as otherwise provided this act shall take

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UNITED STATES OF AMERICA

The Supreme Court

JOHN W. BLODGETT,
Plaintiff-in-Error,
vs.
CHARLES HOLDEN,
U. S. Collector of Internal Revenue for the Fourth Collection District of Michigan,
Defendant-in-Error.

OCTOBER TERM 1927
No. 154.

OCTOBER TERM 1926
No. 779.

Supplemental Brief for Plaintiff-in-Error

Since the filing of the original brief for plaintiff-in-error this Court has decided *1927, Nichols vs. Coolidge, Adv. Op. June 15, 1927, p. 797*, decided May 31, 1927.

The fact that that case, in the judgment of counsel for plaintiff in error, is decisive of one of the questions in this case, viz: the invalidity of the Gift Tax Act as applied to the facts herein, leads counsel to submit this supplemental brief.

I.

The Gift Tax Act by its terms applies to all gifts made during the calendar year 1924. Section 319 of the act provides:

> "For the calendar year 1924 and each calendar year thereafter, a tax equal to the sum of the following is hereby imposed upon the transfer by a resident by gift during such calendar year of any property wherever situated whether made directly or indirectly." • • •
>
> U. S. Rev. Act 1924, approved June 2, 1924 (43 Stat. 253, 313) Appendix A — Original Brief.

As the law was not enacted until June 2, 1924, it is manifest that as to gifts made between January 1, 1924, and June 2, 1924, the tax is retroactive, i. e., imposed on transfers not taxable when made.

The gifts made by plaintiff-in-error, so far as taxable under the act, were made prior to the enactment of the law.

R. 1, 2; Original Brief pp. 2, 3.

II.

Independent of the fact that plaintiff-in-error's gifts, so far as claimed to be taxable, consisted of state and municipal bonds, it is claimed for plaintiff-in-error, that the gift tax act is unconstitutional, in this:

1. That when applied, as here, retroactively, the tax is direct and unapportioned; and

2. A violation of the due process clause of the Fifth Amendment.

III.

The late decisions of this Court sustain our contention.

1921 Levy vs. Wardell, 258 U. S. 542, 544.
1927 Nichols vs. Coolidge, Adv. Op. June 15, 1927, p. 797, decided May 31, 1927.

In *Levy vs. Wardell*, a retroactive application of the Estate Tax Act of September 8, 1916, was sought on behalf of the United States. The transfers there sought to be taxed were (1) gifts *inter vivos* (2) made prior to the enactment of the act (3) not in contemplation of death and (4) were absolute except that donees agreed to pay donor the dividends on the donated stocks during donor's life. (p. 543, 544).

This Court, following its decision in
Schwab vs. Doyle, 258 U. S. 529,
held the act of September 8, 1916, not to be retroactive.

The facts in *Schwab vs. Doyle* differed from those in *Levy vs. Wardell* in this: that in Schwab vs. Doyle the transfer was "in contemplation of death" (p. 534) while in Levy vs. Wardell transfer was "not in contemplation of death" (p. 544).

The reasons given for the decision in Levy vs. Wardell are, therefore, different from those given in Schwab vs. Doyle, and are pertinent and applicable to the case at bar. Those reasons are thus stated: (pp. 544, 545).

> "At the time of the transfers there was no law of the State of California imposing any transfer or inheritance tax, nor was there a law of the United State to that effect, and all of the transfers were intended to take effect in possession and enjoyment upon their date. The act of Congress, therefore, should not be construed to be retroactive, and, if so construed, was in violation of the Constitution of the United States in that it would take the property of plaintiffs without due process of law in violation of the Fifth Amendment, and would not be, besides, a transfer tax or an indirect tax but would be a direct tax thereon in violation of Article I, Section 9, subdivision 4 of the Constitution of the United States, because not laid in proper relation to census or enumeration as therein provided."

In *Levy vs. Wardell* it may fairly be said there was some doubt as to whether the Congress intended the Act of September 8, 1916, to apply to past transactions.

In the case of *Nichols vs. Coolidge*, however, there can be no such doubt. The Act of February 24, 1919 (40 Stat. 1057, 1096) distinctly applied the tax to past transfers. This Court there held such application to be unconstitutional when applied to absolute transfers, not made in contemplation of death, and made prior to the enactment of the Act of February 24, 1919.

IV.

The fact in the case at bar and those in *Levy vs. Wardell* and *Nichols vs. Coolidge* when compared show identity in every particular.

	Levy vs. *Wardell*	*Nichols* vs. *Coolidge*	*Blodgett* vs. *Holden*
1.	Transfer was a gift *inter vivos*	Same	Same
2.	Not in contemplation of death	Same	Same
3.	Made prior to tax law	Same	Same
4.	Was absolute	Same	Same

V.

In the light of these decisions, it is unnecessary further to discuss the cases relied on by the government in the Courts below, such as

1873 Stockdale vs. Ins. Co., 20 Wall. 323

1910 Flint vs. Stone-Tracy Co., 220 U. S. 111

1915 Brushaber vs. U. P. R. R. Co., 240 U. S. 1

1910 Patton vs. Brady, 184 U. S. 608

1913 Billings vs. U. S., 232 U. S. 261

These are discussed in our original brief (pp. 51-53) and so far as inconsistent with *Levy* v. *Wardell* and *Nichols* v. *Coolidge* must be regarded as overruled, so far as gifts *inter vivos* under similar circumstances are concerned.

VI.

It is asked that it be certified to the Court of Appeals for the Sixth Circuit that the Gift Tax Act as applied to the transfer in question is unconstitutional and void because

1. The property transferred was not within the taxing jurisdiction of the United States.

2. The tax is a direct tax not apportioned according to the population.

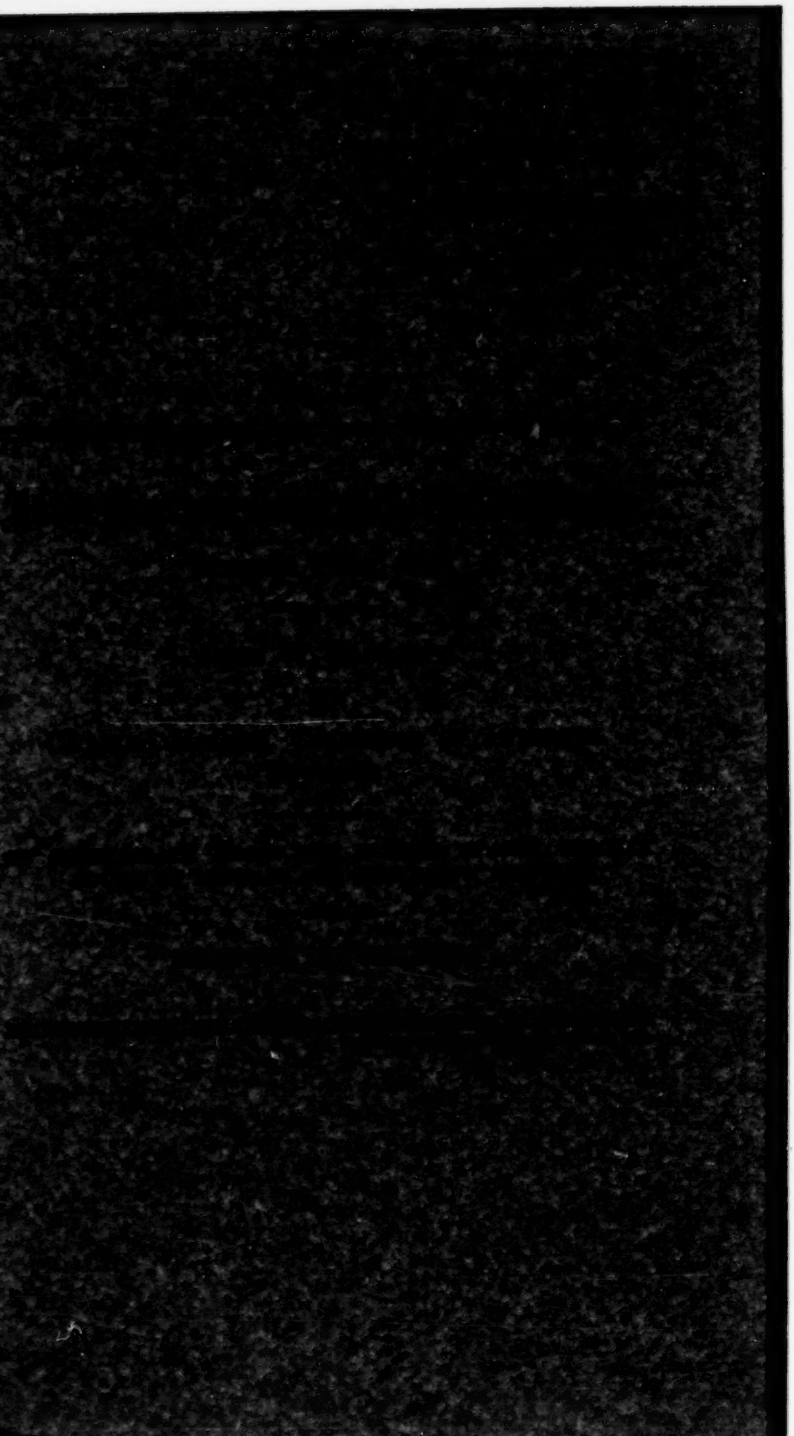
3. The tax, when applied retroactively, is a direct and unapportioned tax.

4. The Congress lacks power to tax absolute, isolated, transfers, not made in contemplation of death, and occurring prior to the enactment of the tax law.

Respectfully submitted.

MARK NORRIS,

Counsel for Plaintiff in Error.



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In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 154

JOHN W. BLODGETT

v.

CHARLES HOLDEN, COLLECTOR OF INTERNAL REVENUE

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE COLLECTOR

OPINION BELOW

The opinion of the District Court is reported in 11 F. (2d) 180. The certificate of the Circuit Court of Appeals is unreported.

JURISDICTION

The case is here on certificate under Section 239 of the Judicial Code, as amended by the Act of February 13, 1925.

STATEMENT

The certificate sets forth the facts, which were undisputed. Inadvertently it misstates the date of approval of the Act of Congress which is involved.

A taxpayer brought action to recover taxes paid upon transfers by gift, levied and exacted under Sections 319 to 324 of the Revenue Act of 1924 (approved June 2, 1924, c. 234, 43 Stat. 253, 313; U. S. C., Title 26, Secs. 1131–1136). Upon a motion in the nature of a general demurrer, the District Court held that no cause of action was stated and rendered judgment for the defendant.

During the calendar year 1924 the taxpayer made gifts to the value of more than $872,000. Exclusive of gifts for charitable and other exempt purposes, his gifts aggregated $843,686 prior to the date on which the Revenue Act of 1924 became effective. Of this amount $818,086.02 consisted of bonds issued by States or political subdivisions thereof. He also made gifts aggregating $6,500.02 between that date and the end of the year. By the Revenue Act a specific exemption of $50,000 is allowed. The net amount of his transfers by gift during that year which were taxed was, therefore, the sum of $800,186.02, on which he paid a tax of $52,023.52 under protest.

These transfers by gift were all inter vivos, and the Government did not contend that they were made in contemplation of death.

The District Court held that the tax was properly levied and collected and that the Revenue Act was in no respect invalid. The Circuit Court of Appeals held that the Revenue Act intended to subject these gifts to the tax so levied and paid and that the taxpayer was not entitled to recover any

part of the taxes so paid if the taxes imposed were not in conflict with the Constitution. The appellate court, however, requested instructions upon the following questions:

THE QUESTIONS CERTIFIED

(1) Are the said provisions of Sections 319 to 324 of the Revenue Act of 1924 unconstitutional as applied to transfers of property by gift, under the circumstances above stated, because the tax so imposed is a direct tax and has not been apportioned, as is required by Clause 3, Section 2, and Clause 4, Section 9 of Article I of the Constitution?

(2) Are said provisions unconstitutional in so far as they impose and levy a tax upon transfers of property by gifts inter vivos, not made in contemplation of death, and made prior to the enactment of said Revenue Act of 1924, either because the same is a direct tax and unapportioned, or because it is a taking of the property of the donor or donee without due process of law, or for public use without just compensation, in violation of the Fifth Amendment to the Constitution?

(3) Are said provisions of said Revenue Act unconstitutional and void as applied to transfers of property by gift, under the circumstances above stated, in so far as it imposes said tax upon transfers of property consisting of bonds and other securities issued by a State or some political subdivision thereof for public uses?

THE STATUTE INVOLVED

The pertinent parts of the Revenue Act of 1924 are set forth in an appendix to this brief (pp. 26–29).

SUMMARY OF ARGUMENT

1. While general property taxes are direct taxes, taxes upon transfers of property are excises. Whether this distinction is or is not entirely logical, it has been thoroughly established by the decisions of this Court.

2. The only retroactive laws which the Constitution forbids Congress to enact are those which are ex post facto. Congress has power to enact retroactive tax laws. No facts are stated which cause the statute here involved to appear arbitrary and unreasonable as applied to the complaining taxpayer.

3. While Congress may not tax State and municipal securities, it may tax transfers of property by gift and include therein transfers of tax-exempt property.

ARGUMENT

I

THE TAX UPON TRANSFERS OF PROPERTY BY GIFT IS NOT A DIRECT TAX BUT AN EXCISE

Direct taxes are, besides capitation taxes, taxes which are levied on persons solely because of their general ownership of property and taxes which are the legal equivalent of such property taxes. This Court went thus far in the Income Tax Cases, but

it refused to give any broader meaning to the term. Every other tax is indirect, regardless of the question whether it may be shifted from the person on whom it is first cast by law and regardless of the question whether it may be avoided. Apparently the only legal equivalent of a tax on the general ownership of property is a tax on the income from such property.

In *Knowlton* v. *Moore*, 178 U. S. 41, the Court pointed out that its decision in the Income Tax Cases did not furnish any basis for a rule broader than that set forth above, saying (p. 82):

> It is true that in the income tax cases the theory of certain economists by which direct and indirect taxes are classified with reference to the ability to shift the same was adverted to. But this disputable theory was not the basis of the conclusion of the court. The constitutional meaning of the word direct was the the matter decided. Considering that the constitutional rule of apportionment had its origin in the purpose to prevent taxes on persons solely because of their general ownership of property from being levied by any other rule than that of apportionment, two things were decided by the court: First, that no sound distinction existed between a tax levied on a person solely because of his general ownership of real property, and the same tax imposed solely because of his general ownership of personal property. Secondly, that the tax on the income derived from such property, real or

> personal, was the legal equivalent of a direct tax on the property from which said income was derived, and hence must be apportioned. These conclusions, however, lend no support to the contention that it was decided that duties, imposts and excises which are not the essential equivalent of a tax on property generally, real or personal, solely because of its ownership, must be converted into direct taxes, because it is conceived that it would be demonstrated by a close analysis that they could not be shifted from the person upon whom they first fall.

And in *New York Trust Co.* v. *Eisner*, 256 U. S. 345, 349, it was held that there was no force in the contention that as a tax upon the transfer of the net assets of a decedent's estate could not be avoided the tax was therefore a direct one.

As indicated by the quotation from the opinion in *Knowlton* v. *Moore*, *supra*, direct taxes are only those which are essentially equivalent to taxes on property generally, real or personal, solely because of its ownership. The same terms were used in *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 150, in deciding that a tax upon the privilege of doing business in a corporate capacity was not a direct tax. The Court based this conclusion upon the ground that the tax was not "upon property solely because of its ownership."

A tax upon the transfer of property by gift is not equivalent to a tax upon property because of

its ownership. It is, rather, on the same basis as a tax on the transfer of an estate at death or one on the transfer of property by sale, or similar taxes. All such taxes have been sustained as excises.

Thus in *Scholey* v. *Rew*, 23 Wall. 331, it was held that a tax upon the succession to real estate upon the death of another was not a tax upon land but a duty or excise. This decision was not questioned in *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 577. It was followed in *Knowlton* v. *Moore*, 178 U. S. 41, where a tax upon the receiving of legacies was sustained as an indirect tax. In *Snyder* v. *Bettman*, 190 U. S. 249, a succession tax was enforced in the case of a transmission of property by legacy to a municipality, upon the ground that the tax was not upon the property but upon the right to succeed to the property (p. 254). And in *New York Trust Co.* v. *Eisner*, 256 U. S. 345, the case of *Knowlton* v. *Moore* was cited as disposing of the contention that a tax upon the transfer of the net estate of every decedent, to be paid by the executor, was a direct tax, the Court saying that such a tax has always been regarded as the antithesis of a direct one (p. 349):

> It is argued that when the tax is on the privilege of receiving, the tax is indirect because it may be avoided, whereas here the tax is inevitable and therefore direct. But that matter also is disposed of by *Knowlton* v. *Moore*, not by an attempt to make some

scientific distinction, which would be at least difficult, but on an interpretation of language by its traditional use—on the practical and historical ground that this kind of tax always has been regarded as the antithesis of a direct tax; "has ever been treated as a duty or excise, because of the particular occasion which gives rise to its levy." 178 U. S. 81–83. Upon this point a page of history is worth a volume of logic.

So also taxes upon particular types of sales (*Nicol* v. *Ames*, 173 U. S. 509; *Thomas* v. *United States*, 192 U. S. 363; see also *Pacific Insurance Co.* v. *Soule*, 7 Wall. 433, 446) or particular commodities (*Hylton* v. *United States*, 3 Dall. 171; *Veazie Bank* v. *Fenno*, 8 Wall. 533; *Patton* v. *Brady*, 184 U. S. 608; *McCray* v. *United States*, 195 U. S. 27; *Billings* v. *United States*, 232 U. S. 261; see also *Bowman* v. *Continental Oil Co.*, 256 U. S. 642, 649) or particular methods of doing business (*Spreckels Sugar Refining Co.* v. *McClain*, 192 U. S. 397; *Flint* v. *Stone Tracy Co.*, 220 U. S. 107; *Stratton's Independence* v. *Howbert*, 231 U. S. 399, 414; see also *Doyle* v. *Mitchell Brothers Co.*, 247 U. S. 179, 183) have been repeatedly sustained as indirect taxes.

If a tax upon a designated type of transfer of property or upon the transfer of a designated type of property must be sustained as an indirect tax, it necessarily follows that a tax upon the gratuitous transfer of property *inter vivos* must be so classed.

Brown v. *Maryland*, 12 Wheat. 419, and similar cases cited on behalf of the plaintiff in error have no bearing upon the question at issue. They have been distinguished by this Court repeatedly, as in *Nicol* v. *Ames*, 173 U. S. 509, 518; *Thomas* v. *United States*, 192 U. S. 363, 371; *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 162–167; *New York Trust Co.* v. *Eisner*, 256 U. S. 345, 348. It is true that where a State may not constitutionally tax a transaction in any manner whatever, an indirect method of reaching a prohibited result is unconstitutional. But as Congress has the right to lay both direct and indirect taxes if it lays them on the permitted bases (*Brushaber* v. *Union Pacific Railroad Co.*, 240 U. S. 1, 13)—to tax property if it follows the rule of apportionment and dealings in property if it follows the rule of uniformity—there would be far less reason for considering whether a federal excise tax were a subterfuge for the reaching of a prohibited end even though the tax which purported to be indirect should have in its effects some points of resemblance to a conceivable direct tax. Moreover, there is nothing exceptional in the levying of excises. They have long been recognized as appropriate and normal methods of raising revenues. Indeed, taxation by uniform laws and not by apportionment among the States constitutes the only fair method of raising the revenues necessary for the running of the Government. To say that a tax must be collected by apportionment as a direct tax is, practi-

cally, to say that it is not a possible source of revenue. Under these circumstances there certainly can not be any presumption that a tax closely analogous to taxes which have been repeatedly sustained as indirect taxes is in its essence a direct tax. On the contrary, there must be a strong presumption of its validity.

As this Court said in *Nicol* v. *Ames*, 173 U. S. 509, 515:

> It is only when the question is free from any reasonable doubt that the court should hold an act of the lawmaking power of the nation to be in violation of that fundamental instrument upon which all the powers of the Government rest. This is particularly true of a revenue act of Congress. * * * The power to tax is the one great power upon which the whole national fabric is based. It is as necessary to the existence and prosperity of a nation as is the air he breathes to the natural man. It is not only the power to destroy, but it is also the power to keep alive.

The time has long since passed, of course, when the right to impose an excise tax is sustained upon the theory that the transaction taxed was the exercise of a privilege conferred by the sovereign authority.

> *Billings* v. *United States*, 232 U. S. 261; *Hylton* v. *United States*, 3 Dall. 171; *Thomas* v. *United States*, 192 U. S. 363.

II

THE TAX LAW IS NOT UNCONSTITUTIONAL AS APPLIED TO TRANSFERS OF PROPERTY BY GIFT DURING THE EARLIER PORTION OF THE YEAR IN WHICH THE LAW WAS PASSED

The only substantial question arising out of the retroactive features of the Act is whether they are so arbitrary and unreasonable as to violate the due-process provision of the Fifth Amendment. The other questions which have been suggested concerning the retroactivity of the law do not require discussion. We have already seen that in determining whether a tax is direct or indirect it is immaterial that the tax may not be shifted from the person on whom it first falls and that it may not be avoided in any other way. And the question whether the tax deprives the taxpayers of their property without just compensation is not a judicial question. The Constitution requires indirect taxes to be laid uniformly throughout the United States, and this tax was so laid. Neither Congress nor the courts may go further and inquire whether a particular individual is being charged more for the benefits conferred on him by the general operations of the Government than those services are worth to him; the tax must stand or fall as to all taxpayers alike. And no court can attempt to decide whether the general operations of the Government are worth less than they cost the taxpayers as a class. This is true whether the tax is entirely prospective or is

partly retroactive. The just-compensation provision has no bearing on tax cases.

It is clearly established that retroactive legislation is not unconstitutional as such. The Constitution forbids Congress to enact ex post facto laws and it forbids the States to enact ex post facto laws and laws impairing the obligation of contracts, but with these express exceptions neither federal nor state legislation is unconstitutional because it is retroactive. See, *e. g.*, *Calder* v. *Bull*, 3 Dall. 386, 391; *The Peggy*, 1 Cranch, 103, 110; *Prize Cases*, 2 Black, 635, 670, 671; *Johannessen* v. *United States*, 225 U. S. 227, 242; *Satterlee* v. *Matthewson*, 2 Pet. 380, 413; *Curtis* v. *Whitney*, 13 Wall. 68, 70; *Kentucky Union Co.* v. *Kentucky*, 219 U. S. 140, 152, 153.

This Court has sustained state tax laws which were retroactive in scope (*Carpenter* v. *Pennsylvania*, 17 How. 456, 463; and see *Locke* v. *New Orleans*, 4 Wall. 172, 173; *Seattle* v. *Kelleher*, 195 U. S. 351, 359, 360; *State* v. *Bell*, 61 N. C. 76, 83, 86); and it has sustained similar federal taxes.

Thus, in *Stockdale* v. *Insurance Companies*, 20 Wall. 323, it sustained the Act of July 14, 1870, c. 255, 16 Stat. 256, 261, by which an earlier statute which might be supposed to have expired was revived and continued in existence for two years longer. The Court said (pp. 331, 332):

> The right of Congress to have imposed this tax by a new statute, although the measure of it was governed by the income of the past

> year, can not be doubted; much less can it be doubted that it could impose such a tax on the income of the current year, though part of that year had elapsed when the statute was passed. The joint resolution of July 4th, 1864, imposed a tax of five per cent upon all income of the previous year, although one tax on it had already been paid, and no one doubted the validity of the tax or attempted to resist it.
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> But where it can exercise a power by passing a new statute, which may be retroactive in its effect, the form of words which it uses to put this power in operation can not be material, if the purpose is clear, and that purpose is within the power. Congress could have passed a law to reimpose this tax retrospectively, to revive the sections under consideration if they had expired, to reenact the law by a simple reference to the sections. Has it done anything more?

This decision was followed in *Railroad Co.* v. *Rose*, 95 U. S. 78, 80.

In *Billings* v. *United States*, 232 U. S. 261, the Court sustained the Act of August 5, 1909, c. 6, 36 Stat. 11, 12, which levied a tax to be collected annually on September first on the use of foreign-built pleasure boats owned or chartered by citizens of the United States, saying (p. 282):

> Again let it be conceded that the causing the tax for the annual period to become due in September, 1909, is to give it in some respects a retroactive effect, such concession

does not cause the act to be beyond the power of Congress under the Constitution to adopt.

And in *Brushaber* v. *Union Pacific R. Co.*, 240 U. S. 1, it sustained the sections of the Act of October 3, 1913, c. 16, 38 Stat. 114, 166, which provided a general income tax from December to December of each year but exceptionally fixed a first period embracing the time from March 1 to December 31, 1913. This limited retroactivity was assailed as repugnant to the due process clause of the Fifth Amendment. The Court (p. 20) declared that this contention was not entitled to further consideration, citing *Stockdale* v. *Insurance Companies, supra.*

So also, without discussing the validity of retroactive taxation, the Court in *Railroad Co.* v. *Collector*, 100 U. S. 595, 597, sustained that portion of the Act of July 13, 1866, c. 184, 14 Stat. 98, 138, 139, which imposed upon corporations a tax measured by the interest paid on their bonds, the case involving interest on bonds issued long before the law was enacted; in *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, it sustained the provisions of the Act of August 5, 1909, c. 6, 36 Stat. 11, 112, 114, which based a tax upon the net income from the then current calendar year; and in *Hecht* v. *Malley* 265 U. S. 144, 164, it enforced the retroactive feature of the revenue law which was enacted February 24, 1919 (c. 18, 40 Stat. 1057, 1126) and which levied taxes for the entire year ending June 30, 1919.

The retroactive taxes imposed by the gift tax law which is now before this Court were sustained by the Circuit Court of Appeals for the Second Circuit in *Anderson* v. *McNeir*, 16 F. (2d) 970.

The authorities which have been cited fully establish the broad general rule that Congress may constitutionally impose retroactive taxes. And the circumstances attending the enactment of the tax provision which is involved in the present case show no justification for this challenge of its validity.

Earlier efforts to establish gift taxes were referred to in the debates on this bill. (65 Cong. Rec., pt. 3, p. 3122; pt. 4, pp. 3172, 3173; pt. 8, p. 8295.) It is sufficient, however, to point out that on February 25, 1924, in the Committee of the Whole House, Chairman Green, of the Committee on Ways and Means, proposed an amendment to the revenue bill which embodied the principle of the gift tax now under consideration. At that time he said (65 Cong. Rec. pt. 3, pp. 3119, 3120):

> Mr. Chairman, a gift tax is a corollary to an estate tax. It is perfectly idle to attempt to raise the estate tax, as we have done to-day, and make no provision with reference to gifts. The estate tax at the present time is being largely evaded by the splitting up of the large estates. I, myself, know of one large estate which has been divided into four parts by the owner thereof giving to his wife one part and one part to each of his three

children. The gifts were made outright. They are absolute in form. They can not be attacked by the Treasury. But at the same time the man who made them has never lost control over the property. He now has as much control over the property as he ever had.

This amendment also is needed on account of the income tax. The splitting up of large estates, of course, reduces the amount of surtaxes to be laid upon the party who so divides them. We have lost more, in my judgment, by the division of these large estates in our income taxes than we have lost by reason of tax-exempt securities, and we have lost millions upon millions by reason of tax-exempt securities.

On the following day he proposed a modification of the terms of his amendment. (65 Cong. Rec., pt. 4, p. 3170.) On that day he said (p. 3172):

Ever since I was connected with revenue matters, ever since I have been on the Ways and Means Committee, I have been endeavoring to get a gift tax inserted in the law. I proposed it at the first session when I was a member of that committee some 10 years ago. Ever since that time I have been laboring to get it inserted in the law, because I knew just exactly what would happen, namely, that these big estates would be gradually split up into different parts, thereby defeating both the income tax and the inheritance tax, and that is the reason our

revenues are so rapidly decreasing from the big estates.

On May 8, 1924, when the bill was before the Senate sitting as in Committee of the Whole, the Finance Committee proposed to strike out the gift tax provisions of the House bill, but Senator Walsh, of Massachusetts, proposed substitute sections imposing gift taxes, and his amendment was accepted by the Senate. (65 Cong. Rec., pt. 8, pp. 8094–8097.) At that time Senator Walsh said (pp. 8095, 8096):

> There are provisions under the present law to tax gifts in anticipation of death. A gift made within a two-year period prior to death is presumed to be a gift in anticipation of death and is included within the property that passes under the estate or inheritance tax. But there is no provision of law imposing a tax upon gifts between the living; and the greatest evasion of all evasions of the income tax has been the making of gifts by the head of a family to his wife and children, either directly or through trusts, for the purpose of having his income so reduced that he would fall within the lower brackets.
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> Again and again an effort has been made to impose some form of gift tax. In the last tax bill the Senate imposed a gift tax. It was stricken out in conference. At this session the House has imposed a gift tax and the Senate committee has recommended its removal. If the Senate now goes on record

in favor of some form of gift tax, it will be enacted. It will be a question merely of rates, because the House has already committed itself.

Personally, I think we are acting when it is too late. I think the bird has flown. I think that so many and so extensive gifts have been made in the last seven years that it is almost impossible to collect anything under a gift tax. But that does not justify leaving the door wide open for a man to continue to make gifts which will permit him to escape the fair and just income and inheritance taxes imposed upon him under the law.

The purpose of gifts inter vivos is to lower the income tax by splitting up the volume of the taxable property.

Senator Simmons, the ranking minority member of the Finance Committee, added (p. 8996):

Mr. President, I do not as a general proposition feel disposed to give my assent to the principle involved in gift taxes. In ordinary conditions I would say that it is not a wise way of raising revenue for the Government. But conditions which confront us are abnormal and seem to me to make the imposition of a tax of this sort absolutely essential.

There are two kinds of taxes which we find it necessary to levy in the conditions which now obtain. One is the income tax, the other is the inheritance tax. From both

of those taxes the Government realizes a very large amount of revenue, revenue that it can not dispense with, that is absolutely necessary to enable us to finance the Government. One of the favorite methods of evading the income tax is through the splitting up of large incomes among members of the family, thus evading the higher rates imposed by surtaxes. That has been very generally resorted to especially by men of large incomes and the Government has lost an immense amount of revenue through that means of evasion.

The inheritance tax also has been extensively evaded in the same way. We have had no provision in the law up to this time that has afforded anything like adequate protection to the Government against those two methods of evasion. We have no statistics. Probably no statistics are available under any conditions, but we have none which would indicate exactly the amount of revenue that has been lost by this method of evading the income tax and this method of evading the estate tax as now imposed. But they have been sufficiently large and extensive, as is now generally conceded, to very greatly impair the revenues of the Government. It is a leak that ought to be stopped, and there is absolutely no way to stop it except by the imposition of a gift tax.

The gift-tax provision was further amended on the report of the conferees of the two Houses but

in respects not material to the present discussion. (65 Cong. Rec., pt. 9, pp. 9530, 9536, 9537.) The amendments to the bill which were approved by the conferees were accepted by the Senate on May 24 (65 Cong. Rec., pt. 9, p. 9421) and by the House of Representatives on May 26 (65 Cong. Rec., pt. 9, p. 9547). The bill was approved by the President on June 2, 1924.

The certificate from the Circuit Court of Appeals states that the gifts under consideration were made between January first and the approval of the law, but it does not say that they were made before February 26, when the House of Representatives decided that such gifts should be taxed (65 Cong. Rec., pt. 4, p. 3177); it does not say that they were made before May 8, when the Senate voted in favor of such a tax (65 Cong. Rec., pt. 8, p. 8097) and thus showed that some form of gift tax would appear in the bill when it came from the conferees; it does not say that the gifts were made before the bill in its final form had passed both Houses. It simply says that these transfers were made before the President had actually approved the law, a number of days after it was submitted to him. For all that appears, the gifts were not made more than a day before the law was approved.

As this Court will not consider the validity of a law except in so far as it affects the parties actually before the Court and the facts shown as to those

parties, the only question which is here necessarily involved is whether Congress may constitutionally tax a transfer by gift made while Congress is enacting the tax law or even after both Houses of Congress have passed the law and it is awaiting the action of the President. This case is not like that of *Nichols* v. *Coolidge*, No. 88, Oct. Term, 1926; decided May 31, 1927. There the Act of Congress reached back and dealt with a transfer which took place a dozen years before the law was passed and attributed to the property its value long after the transfer, and this Court said of such a law that it was "arbitrary, capricious and amounts to confiscation." Indeed, that is the only ground upon which an excise tax, uniform throughout the United States, may be declared unconstitutional, assuming, of course, that the law has been enacted in the manner prescribed by the Constitution. Here the property is valued as of the date of the gift and, so far as appears, the law has not in this case reached back an entire day. These transfers were made after the taxpayer had been warned that Congress proposed to tax them. Under such circumstances, it is submitted, the tax can not be considered arbitrary and unreasonable. Tax laws which were fully as retroactive as that which is involved in the present case have been sustained by this Court repeatedly. We submit that those decisions are controlling.

III

A TAX UPON THE TRANSFER BY GIFT OF STATE AND MUNICIPAL BONDS IS NOT A TAX UPON THOSE BONDS AND MAY BE IMPOSED BY CONGRESS WITHOUT UNCONSTITUTIONALLY INTERFERING WITH THE OPERATIONS OF THE GOVERNMENTS ISSUING SUCH BONDS

In *Greiner* v. *Lewellyn*, 258 U. S. 384, it was expressly decided that the Act of Congress taxing the transfer of estates by death applied even to that part of an estate which consisted of municipal bonds, and that so construed the Act was constitutional. The Court there said (p. 387):

> A State may impose a legacy tax on a bequest to the United States, *United States* v. *Perkins*, 163 U. S. 625, or on a bequest which consists wholly of United States bonds, *Plummer* v. *Coler*, 178 U. S. 115; *Orr* v. *Gilman*, 183 U. S. 278. Likewise the Federal Government may impose a succession tax upon a bequest to a municipal corporation of a State, *Snyder* v. *Bettman*, 190 U. S. 249, or may, in determining the amount for which the estate tax is assessable, under the Act of 1916, include sums required to be paid to a State as inheritance tax, for the estate tax is the antithesis of a direct tax, *New York Trust Co.* v. *Eisner*, 256 U. S. 345. Municipal bonds of a State stand in this respect in no different position from money payable to it. The transfer upon death is taxable, whatsoever the character of the property transferred and to whomsoever the transfer is

made. It follows that in determining the amount of decedent's net estate municipal bonds were properly included.

The tax here involved is not upon the property nor upon the government whose securities are involved, but upon the transfer.

It is submitted that the gratuitous transfer of an obligation by death and its gratuitous transfer *inter vivos* affects the obligee alike and that as the former may be taxed constitutionally the latter also is subject to the taxing power of the Federal Government.

It is true that an Act of Congress taxing state and municipal bonds or the income from such bonds would be unconstitutional. A tax upon their sale would quite probably so affect the market value of those bonds and thus the borrowing power of the governments which issued them as to be invalid for that reason. But a tax upon transfers by gift does not have such an effect. While bonds are bought and sold for investment and for speculative purposes, their purchase for use as gifts is not in such volume as to affect their price and a tax upon their transfer by gift does not affect their market value. In *Plummer* v. *Coler*, 178 U. S. 115, 137, where it was claimed that the remote effect of a tax would be to impair the borrowing power of a government, this Court said that courts should have something more to act upon than mere conjecture; the injury should be obvious and appreciable. The effect of

such a tax as is here involved upon the borrowing power of the state and municipal governments is not merely insignificant; it is wholly conjectural; it is highly improbable that the tax has any effect whatever upon the value of such securities. Certainly such a tax would have a more remote effect upon the state and municipal governments than the federal income tax which was applied to persons deriving incomes from state and municipal governments as independent contractors and was sustained by this Court in *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514.

The tax is not levied upon governmental securities but upon their transfer; and, moreover, its effect upon the state and municipal governments which have issued such securities is merely conjectural, and for that reason is not entitled to consideration.

CONCLUSION

Each of the questions asked by the Circuit Court of Appeals should be answered in the negative. In dealing with the second question, this Court may possibly deem it proper to restrict its answer to the statement that at least, so far as the taxpayer here involved is concerned, there is certainly nothing unreasonable in the retroactive aspects of the gift tax; but the decisions of this Court in numerous other cases justify the broader statement that there was nothing unreasonable in making the tax on the

transfer of gifts retroactive to the beginning of the calendar year in which the law was enacted.

Respectfully submitted.

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SEPTEMBER, 1927.

Appendix

(Act of June 2, 1924, c. 234, 43 Stat. 253; U. S. C., Title 26, Secs. 1131–1136)

Sec. 319. For the calendar year 1924 and each calendar year thereafter, a tax equal to the sum of the following is hereby imposed upon the transfer by a resident by gift during such calendar year of any property wherever situated, whether made directly or indirectly, and upon the transfer by a nonresident by gift during such calendar year of any property situated within the United States, whether made directly or indirectly:

[Here follow the rates of tax.]

Sec. 320. If the gift is made in property, the fair market value thereof at the date of the gift shall be considered the amount of the gift. Where property is sold or exchanged for less than a fair consideration in money or money's worth, then the amount by which the fair market value of the property exceeded the consideration received shall, for the purpose of the tax imposed by section 319, be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year.

Sec. 321. In computing the amount of the gifts subject to the tax imposed by section 319, there shall be allowed as deductions:

(a) In the case of a resident—

(1) An exemption of $50,000;

(2) The amount of all gifts or contributions made within the calendar year to or for the use of the United States, any State, Territory, any politi-

cal subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, or to a trustee or trustees, or fraternal society, order, or association, operating under the lodge system, but only if such gifts or contributions are to be used by such trustee or trustees or by such fraternal society, order, or association, exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, and the amount of all gifts or contributions made within the calendar year by such corporation, trustee, or fraternal society, order, or association for a religious, charitable, scientific, literary, or educational purpose, or for the prevention of cruelty to children or animals, and the amount of all gifts or contributions made within the calendar year to the special fund for vocational rehabilitation authorized by section 7 of the Vocational Rehabilitation Act;

(3) Gifts the aggregate amount of which to any one person does not exceed $500;

(4) An amount equal to the value of any property transferred by gift within the calendar year, which can be identified (A) as having been received by the donor within five years prior to the time of his making such gift, either from another person by gift or from a decedent by gift, bequest, devise, or inheritance, or (B) as having been acquired in exchange for property so received. This deduction

shall be allowed only where a gift tax or an estate tax under this or any prior act of Congress was paid by or on behalf of the donor or the estate of such decedent, as the case may be, and only in the amount of the value placed by the Commissioner on such property in determining the value of the gift or the gross estate of such decedent, and only to the extent that the value of such property is included in the total amount of gifts made within the calendar year and not deducted under paragraph (2) or (3) of this subdivision.

SEC. 322. In case a tax has been imposed under section 319 upon any gift, and thereafter upon the death of the donor the amount thereof is required by any provision of Part I of this title to be included in the gross estate of the decedent then there shall be credited against and applied in reduction of the estate tax, which would otherwise be chargeable against the estate of the decedent under the provisions of section 301, an amount equal to the tax paid with respect to such gift; and in the event the donor has in any year paid the tax imposed by section 319 with respect to a gift or gifts which upon the death of the donor must be included in his gross estate and a gift or gifts not required to be so included, then the amount of the tax which shall be deemed to have been paid with respect to the gift or gifts required to be so included shall be that proportion of the entire tax paid on account of all such gifts which the amount of the gift or gifts required to be so included bears to the total amount of gifts in that year.

SEC. 323. Any person who within the year 1924 or any calendar year thereafter makes any gift or gifts in excess of the deductions allowed by section

321 shall, on or before the 15th day of March, file with the collector a return under oath in duplicate, listing and setting forth therein all gifts and contributions made by him during such calendar year (other than the gifts specified in paragraph (3) of subdivision (a) and in paragraph (2) of subdivision (b) of section 321), and the fair market value thereof when made, and also all sales and exchanges of property owned by him made within such year for less than a fair consideration in money or money's worth, stating therein the fair market value of the property so sold or exchanged and that of the consideration received by him, both as of the date of such sale or exchange.

SEC. 324. The tax imposed by section 319 shall be paid by the donor on or before the 15th day of March, and shall be assessed, collected, and paid in the same manner and subject, in so far as applicable, to the same provisions of law as the tax imposed by section 301.

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